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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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| In the Matter of<br><br>American Communications Services, Inc.<br><br>Petition for Expedited Declaratory Ruling Preempting Arkansas Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CC Docket No. 97-100 |

**AT&T COMMENTS**

Pursuant to the Commission's Public Notice DA 97-652, released April 3, 1997, AT&T Corp. ("AT&T") submits these comments on the petition for declaratory ruling filed by American Communications Services, Inc. ("ACSI") in the above-entitled proceeding on March 25, 1997. In its petition, ACSI alleges that the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") conflicts with the Telecommunications Act of 1996 ("1996 Act" or "Act") and therefore should be preempted by the Commission pursuant to Section 253(d) of the Act.

The Arkansas Act contains several provisions that conflict with the 1996 Act, and otherwise violate Section 253(a) of the 1996 Act. ACSI's petition does not challenge all such provisions, however. Rather, ACSI asks the Commission to preempt: (1) the universal service provisions of the Arkansas Act (Sections 4 and 5); and (2) the authority of the Arkansas PSC to arbitrate and approve interconnection agreements pursuant to Section 252(e)(5) of the Communications Act. For the reasons set

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forth below, AT&T supports ACSI's request that the Commission preempt the Arkansas Act's universal service provisions, but takes no position at this time on the remainder of ACSI's request.

**ARGUMENT**

In its petition, ACSI demonstrates that the Arkansas Act's universal service provisions conflict with the federal universal service requirements in violation of Section 254(f), which prohibits such "inconsistency." Further, these state provisions create barriers to entry into the local services market in violation of Section 253(a). The Commission therefore should preempt enforcement of Sections 4 and 5 of the Arkansas Act.[1]

[1] ACSI also contends that the Arkansas Act has constructively abolished the role of the Arkansas PSC in implementing the 1996 Act because the Arkansas legislation prohibits the PSC from requiring resale, interconnection, and access to unbundled network elements beyond what is required by the 1996 Act or the Commission's implementing regulations. See, e.g., Arkansas Act §§ 9(d),(i). The need for such Commission intervention, however, depends on how the Arkansas Act is interpreted and applied. AT&T believes that the 1996 Act authorizes and "requires" detailed regulation to implement the Act's core substantive provisions that access and interconnection be provided at rates, terms and conditions that are just, reasonable and nondiscriminatory. For example, the Act may require a state commission to go beyond the "minimal" regulations established by the Commission's implementing regulations, as the Commission's First Report and Order recognizes. Thus, if properly construed, the Arkansas Act should not restrict the ability of the PSC to implement the 1996 Act. On the other hand, if the Arkansas Act is construed to bar the Arkansas PSC from considering any requirements beyond the Commission's minimum regulations (e.g., by limiting requesting carriers to the network elements prescribed in the First Report and Order), then the Arkansas

(footnote continued on following page)

Section 4 (a) of the Arkansas Act establishes the Arkansas Universal Service Fund ("AUSF"). In fact, the AUSF has been designed not to promote universal service, but to protect ILECs from the effects of competition, at the expense of new entrants. Specifically, Section 4(e)(4) of the Arkansas Act requires that incumbent LECs be made whole from the AUSF for any reduction in federal universal service or other revenues, including interstate access. Neither the size of the fund nor carrier eligibility for disbursements depends on the cost of service being provided or other legitimate universal service considerations. Moreover, to fund the AUSF, Section 4(b) of the Arkansas Act requires all telecommunications providers in the state to contribute based on their intrastate retail telecommunications service revenues. Finally, as explained in more detail below, significant categories of Competitive Local Exchange Carriers ("CLECs") are excluded from eligibility for AUSF disbursements.

The Arkansas Act is plainly inconsistent with both the letter and purpose of the 1996 Act. The universal service provisions of the 1996 Act are designed to ensure (i) affordable telephone service, (ii) without impairing the prospects for local competition by requiring competitive neutrality with respect to

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(footnote continued from previous page)

legislation would appear to conflict with the 1996 Act, warranting Commission action.

the collection and disbursement of universal service funds. In contrast, the universal service provisions of the Arkansas Act have little to do with providing affordable service and competitive neutrality. As explained by the staff of the Arkansas PSC:

> [The Arkansas Act] is designed as an automatic revenue replacement mechanism to recover any reductions resulting from changes in the federal universal service fund, changes caused by new or existing federal or state regulatory or statutory directives, or changes in intrastate or interstate switched access service revenues, net revenues received from the Arkansas Intrastate Carrier Common Line Pool, interstate access charge pools, or the Arkansas IntraLATA Toll Pool. All of these revenue replacement measures are guaranteed without regard for the actual cost of providing universal service, comparability of rural to urban rates, or the actual earnings of the incumbent LEC.[2]

The Arkansas Act is thus clearly "inconsistent" with Section 254(k) of the Act, which requires that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."

In addition, the Arkansas Act is inconsistent with Section 254(d) of the 1996 Act, which requires that eligible carriers receive universal service support "for the provision, maintenance and upgrading of facilities and services" for which

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[2] Arkansas PSC Staff Analysis, p. 5. A copy of the staff analysis is attached as Exhibit A. In addition to compensation for revenue reductions, the Arkansas Act would require that ILECs receive universal services support based on "all" of their "net investment, including embedded investment" used in the provision of universal service. Section 4(e)(5).

the support is intended. In contrast, Section 5 (b)(2) of the Arkansas Act limits payment of universal service support to that portion of an eligible telecommunications carrier's network facilities that it "owns and maintains." Thus, the Arkansas Act denies universal service support to new entrants that serve high cost areas through unbundled network elements, or facilities leased from a CAP or other CLEC, even though the serving carriers are bearing the costs of those facilities.[3] Such an approach is inconsistent with the 1996 Act's Section 4(e)(5), as explained by the staff of the Arkansas PSC:

> The Bill's requirement that universal service funding be limited to support for services provided over the ETC's facilities is inconsistent with the 1996 Act and subject to preemption.[4]

Finally, all of the aforementioned provisions of the Arkansas Act "may have the effect" of prohibiting carriers other than incumbent LECs from providing local service, which is an independent ground for preemption under Section 253(a) of the 1996 Act. In essence, Arkansas now requires CLECs to reimburse incumbent LECs for competitive losses such new entrants inflict. This substantially reduces the prospects for local competition in Arkansas. Indeed, the uncertainty regarding the viability of

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3 The ILEC providing the unbundled network elements will have received, pursuant to Section 252(d)(1) of the 1996 Act, cost, plus a reasonable profit, for its provision of the network elements.

4 Arkansas PSC Staff Analysis, p. 6 (emphasis in original).

entry created by the Arkansas Act has in fact caused AT&T to withdraw its arbitration request to GTE in that state.

## CONCLUSION

The universal service provisions of the Arkansas Act are inconsistent with federal universal service principles and create impermissible barriers to entry into the Arkansas local services market. For the reasons set forth above, the Commission should preempt those provisions.

Respectfully submitted,

AT&T CORP.

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May 5, 1997

**Exhibit A**

January 24, 1997

# ANALYSIS OF A PROPOSED ACT TO BE ENTITLED

# TELECOMMUNICATIONS REGULATORY REFORM ACT OF 1997

**filed on January 15, 1997 and amended on January 22, 1997**

This analysis provides a summary of the major provisions of the proposed Telecommunications Regulatory Reform Act of 1997 (the Bill) and a comparison of the proposed act with the requirements of the federal Telecommunications Act of 1996 (1996 Act). This analysis may not encompass all potential conflicts with Arkansas and federal law. As the Federal Communications Commission (FCC) continues its implementation of the 1996 Act, additional review of the proposed act may be necessary.

**Section 1. Title.**

**Section 2. Legislative Findings.**

The Bill states that its intent is to provide a telecommunications regulatory system that will aid in implementing the national policy of opening telecommunications markets to competition established in the 1996 Act. It also provides that it will eliminate unnecessary regulation and will recognize the special needs of local exchange carriers serving in high cost rural areas with special funding to preserve universal service.

The stated intent is consistent with the 1996 Act, but some provisions of this Bill are inconsistent with the federal law, as were certain provisions of the ATA draft bill. <u>The provisions of the Bill that are in conflict with the requirements of the 1996 Act are subject to legal challenge or preemption of the state law by the FCC</u>. Pursuant to §253 of the 1996 Act, the FCC is authorized to preempt any state law which is not competitively neutral or has the effect of prohibiting the ability of any entity to provide telecommunications services.

**Section 3. Definitions.**

This section defines technical terms used in the Bill. Some of the definitions in the Bill differ from the definitions contained in the 1996 Act.

***Analysis and Policy Issues.***

**§3(5) Basic Local Exchange Service.** The definition establishes the services that will constitute basic local exchange service. Section 4(e)(2) of the Bill provides that the Commission may revise the list of universal services identified in §3 of the Bill. However, *the definition itself* does not reflect that the Commission is authorized to change the definition. If the definition were amended to reflect that the Commission has this authority, there would be no conflict. Without such an amendment, it appears only the General Assembly can amend the definition once it is enacted.

**Section 4. Preservation and Promotion of Universal Service.**

Section 4 of the Bill establishes the Arkansas Universal Service Fund (AUSF) for the purpose of preserving universal service at reasonable and affordable rates and "to provide for reasonably comparable services and rates between rural and urban areas." (In Arkansas, urban rates are generally higher than those in rural areas.) The AUSF would provide funding to eligible telecommunications carriers (ETCs) for basic local service provided over facilities which are owned by the ETC.

The Commission would establish rules and procedures for the AUSF in accordance with the requirements of Sections 4(e)(1)-(7). If the Commission establishes a minimum or threshold basic local service rate for determining the amount of AUSF funding that ETCs should receive, at that point, any ETC whose basic local service rates are less than the threshold rate could automatically increase its rates up to the threshold level. Commission investigation or analysis of such a rate increase is prohibited by §4(e)(3)(A). Such increases could not be included in the calculation of the basic local exchange service rate increase limits specified in Sections 7 and 12.

The requirements set out at §4(e)(4)(A) also provide for guaranteed replacement of any revenue loss experienced by the incumbent LECs due to changes by the FCC to the existing federal universal service fund. This section provides that the Commission must either increase the incumbent LEC's rates for basic local exchange service or increase the incumbent LEC's recovery from the AUSF, or a combination of the two. Section 4(e)(4)(B) provides further guaranteed revenue replacement for rural telephone companies through either the AUSF or increases in basic local service rates if a rural telephone company experiences any loss of revenues as a result of (a) changes caused by new or existing federal or state regulatory or statutory directives, (b) changes in intrastate or interstate switched access services revenues, or (c) changes in net revenues received from the Arkansas Intrastate Carrier Common Line Pool, interstate access charge pools, or the Arkansas IntraLATA Toll Pool. Section 4(e)(4)(C) does not provide for any Commission determination as to the need for such revenue replacement; rather, recovery is guaranteed without review by the Commission.

Section 4(e)(4)(D) also prohibits changes in the intrastate carrier common line charge (CCL) rate portion of access charges for a period of three (3) years after the date of enactment. Thereafter, the Commission may phase down intrastate CCL rates to the interstate CCL rates. However, any revenue reductions experienced by incumbent LECs as a result of this action would be guaranteed concurrent recovery either through the AUSF or through increases in basic local service rates.

Section 4(e)(5) establishes the only funding mechanism available to *all* eligible telecommunications carriers. The funding mechanisms at §§4(e)(4)(A) through (D) are available only to incumbent LECs. Section 4(e)(5) provides that, if needed "in the future" to maintain affordable rates, high cost funding could be requested by an ETC for investments and expenses necessary for the provision of universal service, required for infrastructure expenditures, or for purposes deemed necessary to preserve and advance the public education and welfare. Section 4(e)(6) sets out three options that an ETC may use to identify and measure costs for the purpose of determining high cost funding.

Upon a request for AUSF funding, the AUSF Administrator, who will be designated by the Commission, has sixty (60) days to review and determine the accuracy of the request. The requesting party has thirty (30) days to request reconsideration of the Administrator's decision by the Commission, which has thirty (30) days to issue its opinion on the reconsideration.

The AUSF is to be funded by assessments on all telecommunications providers, based upon intrastate retail telecommunications services revenues. The Administrator will determine the level of assessments required to be paid by each telecommunications service provider. The costs of administering the AUSF will be recovered through AUSF assessments. All telecommunications providers are authorized to recover the cost of their AUSF assessments by surcharging their customers.

***Analysis and Policy Issues.***

1. Although §4(a) provides that the AUSF shall be designed to provide predictable, sufficient and sustainable funding to eligible telecommunications carriers serving rural or high cost areas of the State, the majority of funding authorized by the Bill is not specifically committed to preserving universal service in high cost areas. Rather, it is designed as an automatic revenue replacement mechanism to recover any reductions resulting from changes in the federal universal service fund, changes caused by new or existing federal or state regulatory or statutory directives, or changes in intrastate or interstate switched access services revenues, net revenues received from the Arkansas Intrastate Carrier Common Line Pool, interstate access charge pools, or the Arkansas IntraLATA Toll Pool. All of these revenue replacement measures are guaranteed without regard for the actual cost of providing universal service, comparability of rural to urban rates, or the actual earnings of the incumbent LEC. This section also anticipates that current subsidies, such as the federal USF, will only decrease. If these subsidies *increase,* there is no provision made to reduce either AUSF receipts or basic local service rates. As a result, incumbent LECs would overrecover universal service funding.

Further, as proposed, only incumbent LECs would be eligible to receive much of the funding provided through the AUSF. Section 4(a) provides that a telecommunications carrier may receive high cost funding only for service provided over facilities owned by the telecommunications carrier. Section 214(e)(1)(A) of the 1996 Act provides that, to qualify for designation as an ETC and be eligible for federal universal service funding, a common carrier must offer the services that are supported by federal universal service support mechanisms *either using its own facilities or a combination of its own facilities and resale of another carrier's* *services.* The Bill's requirement that universal service funding be limited to support for services provided over the ETC's facilities is inconsistent with the 1996 Act and subject to preemption.

2. The requirement of §4(e)(4) that intrastate CCL rates continue unchanged for three years may result in intrastate long distance rates being higher than the rates charged for interstate long distance calls.

3. Section 4(b) provides that AUSF assessments paid by telecommunications providers may be directly surcharged on customers' telephone bills. Thus, every dollar needed to fund the AUSF will increase the cost of telephone service for every business and residential customer in the State. AUSF assessment surcharges would be exempt from state taxes.

4. The Bill may not have the flexibility to be reconciled with the universal service rules that the FCC must adopt pursuant to §254 of the 1996 Act not later than May 8, 1997.

**Section 5. Eligible Telecommunications Carrier.**

Incumbent LECs are designated as eligible telecommunications carriers for purposes of receiving AUSF and federal universal service funding.

In areas served by non-rural telephone companies and the incumbent LEC receives AUSF funding, the Commission may designate another telecommunications carrier as an ETC only for the purpose of receiving high cost funding from the AUSF. The competing LEC would be required to provide service to all customer in the incumbent LEC's local exchange area, could receive AUSF funding only for facilities it owned, the funding could be no greater than the funding paid to the incumbent LEC, must advertise the availability and charges of its services, and the Commission must find that the designation as an ETC is in the public interest. A competing LEC would be ineligible for high cost support pursuant to Section 5 until it had facilities in place and offered to serve all customers in the service area.

In exchanges where the Commission designated more than one ETC, a local exchange carrier must be permitted to relinquish its ETC designation.

For purposes of both state and federal universal service funds, only a rural incumbent LEC would be designated an ETC in the areas served by the rural LEC. The rural LEC may waive this designation by filing notice with the Commission.

***Analysis and Policy Issues.***

1. Designation as an eligible telecommunications carrier is required to receive federal and state universal service funding. Section 214(e)(2) of the 1996 Act requires that a State commission designate a common carrier that meets the requirements of §214(e)(1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience and necessity, the State commission *may*, in the case of an area served by a rural telephone company, and *shall*, in the case of all other areas, designate more than one common carrier as an ETC for a service area designated by the State commission. Before designating an additional ETC for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. Section 5(d) of the Bill provides that, for the entire area served by a rural telephone company, excluding Tier One companies, for the purpose of the AUSF and the federal universal service fund, *there shall be only one eligible telecommunications carrier, which shall be the incumbent LEC that is a rural telephone company*. Pursuant to §5(d), another telecommunications provider can be designated an ETC in an area served by a rural incumbent LEC only if the rural incumbent LEC

decides to permit the designation of a competing LEC as an ETC by waiving "its right to be the only eligible telecommunications carrier within the local exchange area." Such a limitation conflicts with §214(e)(2) of the 1996 Act, which provides that the State commission may designate more than one ETC for federal universal service in an area served by a rural LEC if it is in the public interest. The Bill shifts the public interest determination from the Commission to the rural LEC, giving it the authority to decide if and when another telecommunications provider could be designated an ETC in its service area. As this provision restricts access to universal service funding in a manner that conflicts with the 1996 Act, it would be subject to FCC preemption.

**Sections 6-8. Election and Application of Price Cap Regulation.**

These sections permit an incumbent LEC to elect to use a form of price cap regulation for its rates, terms and conditions for providing basic local service and switched access service simply by filing a notice of intent with the Commission. Upon such election, the rates in effect on the date twelve months prior to the date of the price cap election would be deemed just and reasonable, and would become the maximum rates for basic local and switched access services that an electing incumbent LEC could charge for a period of three years, excluding rate increases made without Commission review pursuant to Section 4. During the three year period, an electing incumbent LEC could decrease its rates, but then increase rates to the maximum level effective immediately, simply by filing notice with the Commission. Customers of electing incumbent LECs could file complaints only regarding the incumbent LEC's quality of service but not with regard to any matter concerning rates.

After the initial three year period, an electing incumbent LEC could adjust its rates for basic local service and switched access service using an inflation-based cap measured by changes in the consumer price index. The inflation-based cap would be adjusted for the impact of exogenous factors attributable to changes in federal, state, or local government mandates, rules or statutes. For incumbent LECs, the cap would exclude any rate increases in connection with universal service pursuant to §4. The rate cap may only be adjusted once each twelve (12) months, beginning at the expiration of the three year period after the date of initial filing to elect price cap regulation. After the initial three year period, if a competing LEC offers services in a service area of an electing LEC, rates for basic local and switched access services would be set pursuant to the price list provisions of §8.

Section 8 exempts an electing LEC from rate base/rate of return monitoring or regulation. An electing LEC is authorized to increase or decrease rates for all telecommunications services that are not basic local or switched access services and to set rates for new services by filing a tariff or price list with the Commission. Such rates would not be subject to Commission approval, but are deemed just and reasonable.

***Analysis and Policy Issues.***

1. These sections appear to prohibit customers of electing LECs from filing complaints with the Commission regarding the rates charged by an electing LEC. If an electing LEC charged a customer in excess of the applicable rate, the customer appears to have no recourse with the Commission to resolve the complaint.

2. After the initial three year period, basic local and switched access rates of an electing LEC would essentially be deregulated in the electing LEC's service area where a competing LEC

provides local exchange service. This would occur regardless of the actual extent of competition in the area.

**Section 9. Authorization of Competing Local Exchange Carriers.**

This section authorizes the Commission to grant Certificates of Public Convenience and Necessity (CCNs) to telecommunications providers to provide basic local exchange and switched access services in areas not served by rural LECs. Applicants for such CCNs must demonstrate financial, managerial and technical capability to provide this service. Competing LECs must maintain a current tariff or price list with the Commission. No governmental entity could obtain a CCN to provide basic local exchange service.

The Commission is prohibited from requiring an incumbent LEC to negotiate or resell local services except as required by the 1996 Act. Unbundled network elements would be priced at actual costs, including an allocation of joint and common costs and a reasonable profit. The Commission's authority over interconnection, resale and unbundling is limited to the terms, conditions, and agreements under which the incumbent LEC will offer such services. Wholesale rates for existing retail services will be the retail rate less any net avoided costs, which are defined as the total costs that will not be incurred by the LEC as a result of selling the service for resale minus any additional costs that will be incurred as a result of selling the service for retail. Incumbent LECs would provide competing LECs nondiscriminatory access to operator services, directory listings, and 911 services to the extent required by the 1996 Act, at reasonable rates.

The Commission would be required to approve any negotiated interconnection agreement or a statement of terms and conditions filed by Southwestern Bell Telephone Company pursuant to §252(f) of the 1996 Act "unless it is shown by clear and convincing evidence" that the agreement does not meet the minimum requirements of §251 of the 1996 Act.

***Analysis and Policy Issues.***

1. The prohibition against a governmental entity obtaining a CCN to provide basic local exchange service is contrary to §253 of the 1996 Act, which provides that no state statute may have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.

2. The Bill requires that the Commission reject a negotiated agreement for interconnection only if there is "clear and convincing evidence" that the agreement does not meet the minimum requirements of §251 of the 1996 Act. The grounds for state commission rejection of such an agreement, as specifically set out in §252(e)(2) of the 1996 Act, are a finding that:

> 1. the agreement discriminates against a telecommunications provider that is not a party to the agreement; or
>
> 2. the implementation of the agreement is not in the public interest, convenience and necessity; or
>
> 3. the agreement does not meet the requirements of §251.

Thus the Bill eliminates two of the grounds set out in the 1996 Act for rejecting an agreement. <u>This provision could lead to a legal challenge to the extent it is in conflict with the federal law and may infringe on the rights of other telecommunications providers.</u>

3. This section may not be consistent with the interconnection rules adopted in August 1996 by the FCC, pursuant to §251(d) of the 1996 Act. The cost allocation and pricing provisions of the FCC's rules have been stayed by the Eighth Circuit Court of Appeals. Once

those legal challenges have been resolved, inconsistencies between the Bill and the FCC's rules on interconnection may become apparent.

**Section 10. Competing Local Exchange Carriers in Service Areas of Rural Telephone Companies.**

Rural LECs would not be required to negotiate an interconnection agreement with a potential competing LEC until the rural LEC has received a bona fide request for interconnection and the Commission has found, based upon "clear and convincing evidence," that the request is:

1. not unduly economically burdensome;
2. technically feasible; and
3. consistent with the preservation of universal service and the public interest, convenience and necessity.

The Commission could not find "clear and convincing evidence" unless it found that the requested interconnection would not have a significant adverse impact on any one of ten factors specified in the Bill. A Commission decision on the request for interconnection in a rural LEC service area would have to be made within 120 days after notice of the request. If no order is entered within that time, the request is deemed denied.

***Analysis and Policy Issues.***

1. The 1996 Act provides for a rural LEC exemption from the interconnection, resale and other requirements in §251(c). Section 251(c) states that "the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254." By requiring a potential competing LEC to meet an

extraordinary level of proof, clear and convincing evidence, of no significant adverse impact on any of the ten specified items, <u>this section would be subject to challenge and probable preemption by the FCC.</u>

2. Section 251(f)(2) of the 1996 Act allows a rural LEC to request a suspension or modification of the §251 requirements. However, the rural LEC must make the request for the relief and must bear the burden of proving the need for the exemption. The Bill appears to relieve the rural LEC of the need to request such relief. <u>This shifting of the burden of proof is inconsistent with the 1996 Act and is subject to preemption.</u>

**Section 11. Regulatory Reform.**

Section 11(f) provides that incumbent LECs regulated under Section 6, incumbent rural LECs operating under alternative regulation, and competing LECs shall not be subject to numerous statutes, including:

1. Section 23-2-304(a)(1) - Certain powers of Commission enumerated. This provision authorizes the Commission to find and fix just and reasonable rates to be charged by any public utility.

2. Section 23-3-112 - Forms sent to utilities to be filled out and returned. This statute requires any public utility receiving from the Commission any blanks with directions to fill the blanks to properly fill the blanks to answer fully, specifically, and correctly every question therein.

3. Section 23-3-114 - Unreasonable preferences prohibited. This statute prohibits a public utility from granting unreasonable preferences to any person or corporation, or

subject any person or corporation to any unreasonable prejudice. It also prohibits a public utility from establishing an unreasonable difference as to rates or services, either as between localities or as between classes of service. The Commission is authorized to fix uniform rates applicable throughout the territory served by any public utility whenever the public interest requires such uniform rates.

4. Section 23-3-118 - Rates, charges, or service - Investigations. This statute authorizes the Commission, whenever it believes any rate is unreasonable or unjustly discriminatory or any service is inadequate, to make a preliminary investigation. If, after a preliminary investigation, the Commission believes that sufficient grounds exist to justify a formal investigation, it is authorized to make an order to that effect and conduct proceedings as though a complaint had been filed with the Commission.

5. Section 23-3-119(a)(2) - Complaints. This provision provides that any consumer or prospective customer of any utility service may complain to the Commission with respect to the service, furnishing of service, or any discrimination with respect to any service or rates.

6. Section 23-3-201 - Requirement for new construction or extension. This statute requires a public utility undertaking new construction or extension of facilities to obtain a CCN. (Exemption from this statute could remove a LEC's right to eminent domain for construction of facilities.)

7. Section 23-4-107 - Rate schedules. This statute requires that a public utility not charge a greater rate for any service than that prescribed in the schedules of the public utility.

8. Section 23-4-109 - Minimum charges. This statute prohibits a public utility from charging a minimum charge for services to be rendered.

9. Section 23-4-201(d) - Electric, gas, telephone, or sewer utilities - ratemaking authority. This provision states that "[n]othing in this section shall be construed to change or alter the rates being charged for electric, gas, telephone, or sewer public utility services until changed by order of the Arkansas Public Service Commission in the manner provided by law."

10. Section 23-17-234 - Connection, interconnection, etc. of lines, facilities, and systems. This statute provides that the Commission has the power and jurisdiction, upon petition of an interested party, to order and direct the connection and interconnection of the lines, facilities, and systems of any telephone company or cooperative.

This section of the Bill exempts cellular and wireless telephone providers from Commission jurisdiction. Pursuant to Ark. Code Ann. §23-1-101(4)(B)(ii), the Commission currently does not regulate the rates or terms of service of cellular telephone providers.

Rural LECs electing to be regulated under this section would be authorized to use cost proxies, rather than cost studies reflecting their actual costs.

Subsection (j) prohibits the unauthorized change of a customer's service to another telecommunications service provider. Any telecommunications carrier that violates this verification procedure and collects charges for telecommunications services from the customer shall be liable to the carrier previously selected by the customer in an amount equal to all charges paid by the customer after the violation occurs. The Commission is authorized to impose civil penalties not to exceed $5000 for any such violation.

***Analysis and Policy Issues.***

1. Under this section and §12, the ability of the Commission to investigate the rates of rural LECs is unclear. The customers of the rural LECs would have limited recourse for complaints regarding unreasonable or unjust rates, as §11(f) exempts LECs from Ark. Code Ann. §23-3-119(a)(2), which provides that any consumer or prospective consumer of any utility service may complain to the Commission with respect to any service, furnishing of service, or any discrimination with respect to any service or rates.

2. Section 254(k) of the 1996 Act provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." It authorizes States to establish any necessary cost allocation rules, accounting safeguards and guidelines "to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." Pursuant to the exemptions provided by this section, incumbent LECs and competing LECs would not be subject to any rules of the Commission adopted to carry out §254(k) of the 1996 Act and would not be subject to investigation or accounting safeguards promulgated by the Commission to comply with the 1996 Act.

**Section 12. Optional Alternative Regulation of Non-Tier One Rural Telephone Companies.**

Rural LECs could elect alternative regulation pursuant to this section by filing notice with the Commission. The rural LEC would be exempt from rate review or regulation by the Commission. Rates for telecommunications services other than basic local and switched access services would be effective upon the filing of a tariff or price list with the Commission. On the date of election, the tariffed rates of the rural LEC would be deemed just and reasonable.

The rural LEC could increase basic local service rates after it has given subscribers 60 days' notice, which would include an explanation of the customers' rights to petition the Commission for a hearing on the rate increase. In order to receive a hearing on the rate increase, a formal petition signed by at least fifteen percent (15%) of the affected subscribers (only the subscriber in whose name the telephone service is listed will be counted as a petitioner) would have to be submitted to the Commission within 60 days of the date of notice of the rate increase. If the Commission receives a "proper" petition within the 60 day period, the Commission may suspend the rate increase. The Commission must hold and complete a hearing within 90 days after the filing of the petition to determine if the rate increase is just and reasonable, and issue an order within 60 days thereafter. If the Commission does not enter a timely order, the petition is deemed denied and rates deemed approved for all purposes, including the purpose of appeal.

The Commission may review the rates of any rural LEC that has increased its basic local service rates by more than the greater of 15% or $2.00 per access line per month, within any consecutive 12 month period. The Commission must hold and complete the hearing within 90 days of the notice to the LEC and issue an order within 60 days of the close of the hearing. The Commission may not reduce rates below the rates in effect at the time of the notice or the actual cost of service as established in the hearing, whichever amount is greater. No rates may be set below the actual cost of service of the rural LEC. The rural LEC cannot change its rates for basic local service for 90 days after a Commission order adjusting rates.

Rates for switched access would be set pursuant to the price cap provisions of §7. Customers would have the right to complain to the Commission regarding quality of service. If, at any time three years after a rural LEC gives notice to elect regulation pursuant to this section, a competing telecommunications provider offers basic local service in the rural LEC's local exchange area, the rural LEC's rates for basic local service and switched access service would then be set simply by filing a price list with the Commission. Changes in rates would go into effect immediately.

***Analysis and Policy Issues.***

1. Given the time frames and the number of affected customers required to petition for a hearing on a rural LEC rate increase, it would be very difficult for customers to petition the Commission for a hearing on the rate increase. At least 15% of the affected customers would have to sign and submit a petition to the Commission within 60 days of notice of the proposed rate increase. By contrast, Ark. Code Ann. §§23-4-901 through 909 provides that rural electric cooperatives are allowed to change rates without a rate case after giving at least 90 days' notice of the proposed rate increase to their customers and the Commission. Unlike rural LECs, the electric co-ops are owned by their member-consumers. The member-consumers of the co-op then have 90 days to petition the Commission to apply rate case procedures to the electric co-op. Only ten percent (10%) of the co-op's members-consumers must petition the Commission to apply rate case procedures within that time limit or the rate increase goes into effect.

2. Ark. Code Ann. §23-4-903 provides that electric co-ops are required to include in the notice to the Commission a verified statement of the number of customers served by the co-op. This facilitates the Commission's determination of whether the petition meets the required